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HOUSE BILL 206

46TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2004

INTRODUCED BY

John A. Heaton

FOR THE RADIOACTIVE AND HAZARDOUS MATERIALS COMMITTEE

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING THE WATER QUALITY ACT TO
ELIMINATE DE NOVO HEARINGS TO THE WATER QUALITY CONTROL
COMMISSION AND PROVIDE FOR REVIEW BY THE COMMISSION BASED ON
THE RECORD OF A PUBLIC HEARING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 74-6-5 NMSA 1978 (being Laws 1973,
Chapter 326, Section 4, as amended) is amended to read:

"74-6-5. PERMITS--CERTIFICATION--APPEALS TO COMMISSION.--

A. By regulation, the ~~commission~~ may require
persons to obtain from a constituent agency designated by the
~~commission~~ a permit for the discharge of any water contaminant
or for the disposal or reuse of septage or sludge.

B. The ~~commission~~ shall adopt regulations
establishing procedures for certifying federal water quality

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1 permits.

2 C. Prior to the issuance of a permit, the
3 constituent agency may require the submission of plans,
4 specifications and other relevant information that it deems
5 necessary.

6 D. The commission shall by regulation set the dates
7 upon which applications for permits shall be filed and
8 designate the time periods within which the constituent agency
9 shall, after the filing of an administratively complete
10 application for a permit, either grant the permit, grant the
11 permit subject to conditions or deny the permit.

12 E. The constituent agency shall deny any
13 application for a permit or deny the certification of a federal
14 water quality permit if:

15 (1) the effluent would not meet applicable
16 state or federal effluent regulations, standards of performance
17 or limitations;

18 (2) any provision of the Water Quality Act
19 would be violated;

20 (3) the discharge would cause or contribute to
21 water contaminant levels in excess of any state or federal
22 standard. Determination of the discharges' effect on ground
23 water shall be measured at any place of withdrawal of water for
24 present or reasonably foreseeable future use. Determination of
25 the discharges' effect on surface waters shall be measured at

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1 the point of discharge; or

2 (4) the applicant has, within the ten years
3 immediately preceding the date of submission of the permit
4 application:

5 (a) knowingly misrepresented a material
6 fact in an application for a permit;

7 (b) refused or failed to disclose any
8 information required under the Water Quality Act;

9 (c) been convicted of a felony or other
10 crime involving moral turpitude;

11 (d) been convicted of a felony in any
12 court for any crime defined by state or federal law as being a
13 restraint of trade, price-fixing, bribery or fraud;

14 (e) exhibited a history of willful
15 disregard for environmental laws of any state or the United
16 States; or

17 (f) had an environmental permit revoked
18 or permanently suspended for cause under any environmental laws
19 of any state or the United States.

20 F. The commission shall by regulation develop
21 procedures that ensure that the public, adjacent landowners,
22 affected governmental agencies, Indian nations, tribes or
23 pueblos and any other state whose water may be affected shall
24 receive notice of each application for issuance or modification
25 of a permit and any public hearing on the application. No

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1 ruling shall be made on any application for a permit without
2 opportunity for a public hearing at which all interested
3 persons shall be given a reasonable chance to submit evidence,
4 data, views or arguments on the application or draft permit
5 orally or in writing and to examine witnesses testifying at the
6 hearing. The hearing shall be recorded. Any person submitting
7 evidence, data, views or arguments shall be subject to
8 examination at the hearing.

9 G. The commission may adopt regulations for the
10 operation and maintenance of the permitted facility, including
11 requirements, as may be necessary or desirable, that relate to
12 continuity of operation, personnel training and financial
13 responsibility, including financial responsibility for
14 corrective action.

15 H. Permits shall be issued for fixed terms not to
16 exceed five years, except that for new discharges, the term of
17 the permit shall commence on the date the discharge begins, but
18 in no event shall the term of the permit exceed seven years
19 from the date the permit was issued.

20 I. By regulation, the commission may impose
21 reasonable conditions upon permits requiring permittees to:

22 (1) install, use and maintain effluent
23 monitoring devices;

24 (2) sample effluents and receiving waters for
25 any known or suspected water contaminants in accordance with

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1 methods and at locations and intervals as may be prescribed by
2 the commission;

3 (3) establish and maintain records of the
4 nature and amounts of effluents and the performance of effluent
5 control devices;

6 (4) provide any other information relating to
7 the discharge or direct or indirect release of water
8 contaminants; and

9 (5) notify a constituent agency of the
10 introduction of new water contaminants from a new source and of
11 a substantial change in volume or character of water
12 contaminants being introduced from sources in existence at the
13 time of the issuance of the permit.

14 J. The commission shall provide by regulation a
15 schedule of fees for permits, not exceeding the estimated cost
16 of investigation and issuance, modification and renewal of
17 permits. Fees collected pursuant to this section shall be
18 deposited in the water quality management fund.

19 K. The issuance of a permit does not relieve any
20 person from the responsibility of complying with the provisions
21 of the Water Quality Act, any applicable regulations or water
22 quality standards of the commission or any applicable federal
23 laws, regulations or standards.

24 L. A permit may be terminated or modified by the
25 constituent agency that issued the permit prior to its date of

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1 expiration for any of the following causes:

2 (1) violation of any condition of the permit;

3 (2) obtaining the permit by misrepresentation
4 or failure to disclose fully all relevant facts;

5 (3) violation of any provisions of the Water
6 Quality Act or any applicable regulations, standard of
7 performance or water quality standards;

8 (4) violation of any applicable state or
9 federal effluent regulations or limitations; or

10 (5) change in any condition that requires
11 either a temporary or permanent reduction or elimination of the
12 permitted discharge.

13 M. If the constituent agency denies, terminates or
14 modifies a permit or grants a permit subject to condition, the
15 constituent agency shall notify the applicant or permittee by
16 certified mail of the action taken and the reasons.

17 N. A person who participated in a permitting action
18 before a constituent agency or a person affected by a
19 certification of a federal permit and who is adversely affected
20 by such permitting action or certification may file a petition
21 for review before the commission. [~~The petition shall be made~~
22 ~~in writing to the commission within thirty days from the date~~
23 ~~notice is given of the constituent agency's action.~~] Unless a
24 timely petition for review is made, the decision of the
25 constituent agency shall be final and not subject to judicial

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1 review. The petition shall:

2 (1) be made in writing to the commission
3 within thirty days from the date notice is given of the
4 constituent agency's action;

5 (2) include a statement of the issues to be
6 raised and the relief sought; and

7 (3) be served on all other persons submitting
8 evidence, data, views or arguments in the proceeding before the
9 constituent agency.

10 0. If a timely petition for review is made, the
11 commission shall ~~[hold a hearing]~~ consider the petition within
12 ninety days after receipt of the petition. The commission
13 shall notify the petitioner and the applicant or permittee if
14 other than the petitioner by certified mail of the date, time
15 and place of the ~~[hearing. If the commission deems the action~~
16 ~~that is the subject of the petition to be affected with~~
17 ~~substantial public interest, it]~~ review. If the petitioner is
18 not the applicant or permittee, the applicant or permittee
19 shall be a party to the proceeding. The commission shall
20 ensure that [the public] a person who submitted evidence, data,
21 views or arguments before the constituent agency receives
22 notice of the date, time and place of the [hearing and is given
23 ~~a reasonable chance to submit data, views or arguments orally~~
24 ~~or in writing and to examine witnesses testifying at the~~
25 ~~hearing. A person submitting data, views or arguments orally~~

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1 ~~or in writing shall be subject to examination at the hearing.~~
2 ~~In the hearing, the burden of proof shall be upon the~~
3 ~~petitioner. The commission may designate a hearing officer to~~
4 ~~take evidence in the hearing. Based upon the evidence~~
5 ~~presented at the hearing, the commission shall sustain, modify~~
6 ~~or reverse the action of the constituent agency.]~~

7 [P. ~~If the petitioner requests, the hearing shall~~
8 ~~be recorded at the cost of the petitioner. Unless the~~
9 ~~petitioner requests that the hearing be recorded, the decision~~
10 ~~of the commission shall be final] review.~~

11 P. The commission shall review the record compiled
12 before the constituent agency, including the transcript of any
13 public hearing held on the application or draft permit, and
14 shall allow any party to submit arguments. The commission may
15 designate a hearing officer to review the record and the
16 arguments of the parties and recommend a decision to the
17 commission. The commission shall consider and weigh only the
18 evidence contained in the record before the constituent agency
19 and the recommended decision of the hearing officer, if any,
20 and shall not be bound by the factual findings or legal
21 conclusions of the constituent agency. Based on the review of
22 the evidence, the arguments of the parties and recommendations
23 of the hearing officer, the commission shall sustain, modify or
24 reverse the action of the constituent agency. The commission
25 shall keep a record of the review.

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1 Q. Prior to the date set for review, if the
2 commission determines that proposed additional evidence, data,
3 views or arguments are relevant and that there was good reason
4 for the failure to present the evidence, data, views or
5 arguments in the proceeding before the constituent agency, the
6 commission shall order that additional evidence, data, views or
7 arguments be taken by the constituent agency. Based on the
8 additional evidence, data, views or arguments, the constituent
9 agency may revise the permitting action or certification and
10 shall promptly file with the commission the additional
11 evidence, data, views or arguments received and the action
12 taken.

13 R. The commission shall notify the petitioner and
14 all other participants in the review proceeding of the action
15 taken by the commission and the reasons for that action."

16 Section 2. Section 74-6-7 NMSA 1978 (being Laws 1967,
17 Chapter 190, Section 6, as amended) is amended to read:

18 "74-6-7. ADMINISTRATIVE ACTION-- JUDICIAL REVIEW. --

19 A. Except as otherwise provided in the Water
20 Quality Act, a person who is adversely affected [by a
21 ~~regulation adopted by the commission or~~] by a compliance order
22 approved by the commission or who participated in a permitting
23 action or appeal of a certification before the commission and
24 who is adversely affected by such action may appeal to the
25 district court [of appeals] for further relief pursuant to the

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1 provisions of Section 39-3-1.1 NMSA 1978. All such appeals
2 shall be upon the record made before the commission and shall
3 be taken to the district court [~~of appeals~~] within thirty days
4 after the [~~regulation~~] compliance order, permitting action or
5 certification that is being appealed occurred. [~~If an appeal~~
6 ~~of a regulation is made, then the date of the commission's~~
7 ~~action shall be the date of the filing of the regulation under~~
8 ~~the State Rules Act.~~]

9 B. A person who is or may be adversely affected by
10 a regulation adopted by the commission may appeal the
11 regulation by filing a notice of appeal with the court of
12 appeals within thirty days of the filing of the regulation by
13 the commission pursuant to the State Rules Act.

14 [~~B.-~~] C. Upon appeal, the court of appeals shall set
15 aside the [~~commission's action~~] regulation only if it is found
16 to be:

- 17 (1) arbitrary, capricious or an abuse of
18 discretion;
19 (2) not supported by substantial evidence in
20 the record; or
21 (3) otherwise not in accordance with law.

22 [~~C.-~~] D. After a hearing and a showing of good cause
23 by the appellant, a stay of the action being appealed may be
24 granted pending the outcome of the judicial review. The stay
25 of the action may be granted by the commission or by the court

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1 [of appeals] if the commission denies a stay or fails to act
2 upon an application for a stay within ninety days after receipt
3 of the application. "

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